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In the Supreme Court of the United States

SHAFIQ RASUL, ET AL., *Petitioners*
v.
GEORGE W. BUSH, ET AL., *Respondents*

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL., *Petitioners*
v.
UNITED STATES OF AMERICA, ET AL., *Respondents*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and to foster improved public understanding of the military justice system. NIMJ appears regularly as an *amicus curiae* before the United States Court of Appeals for the Armed Forces, and appeared in this Court as an *amicus* in support of the Government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999). NIMJ is actively involved in public education through its website, <www.nimj.org>, and through publications including the *Annotated Guide to Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism* (2002) and the *Military Commission Instructions Sourcebook* (2003). NIMJ sponsored the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice, chaired by Hon. Walter T. Cox III, former Chief Judge of the United States Court of Appeals for the Armed Forces. NIMJ's advisory board includes law professors, private practitioners and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers, several as flag and general officers. NIMJ is entirely independent of the Government, and relies exclusively on voluntary contributions for its programs.

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[1] Counsel for all parties have consented to the filing of this brief. Copies of their letters have been filed with the Clerk. Counsel for NIMJ have authored this brief in whole, and no person or entity other than the amicus, its members or its counsel has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Government relies on *Johnson v. Eisentrager* for the proposition that upholding jurisdiction over prisoners held by the United States military at Guantanamo Bay will interfere with the exercise of the executive's power by "fettering...field commander[s]." (Brief for the Respondents in Opposition to the petitions for certiorari ("Opp.") at 11) The National Institute of Military Justice submits this brief to emphasize that, in the half-century since *Eisentrager*, both domestic military law and the international law of war have advanced, increasing the role of the judiciary in respect of military matters, in war as well as in peace. A well-developed body of law regarding individuals seized during hostilities has been enforced regularly by impartial tribunals in past conflicts, and is being applied today by United States armed forces in combat. The application of the rule of law to individuals seized during hostilities is not inconsistent with the Executive Branch's exercise of its war powers, either in theory or in the practice of the United States over the past fifty years. Nor is there anything novel about issuing a writ of habeas corpus on the application of an individual confined by the military at Guantanamo Bay, something the highest court of the military did in *Burtt v. Schick*, 23 M.J. 140 (1986).

ARGUMENT

I. The History Of Domestic And International Military Law Since *Eisentrager* Has Been One Of Steady Progress In The Rule Of Law During Hostilities As Well As In Peacetime

A. Domestic Law

On May 5, 1950, one month before this Court decided *Johnson v. Eisentrager*, 339 U.S. 763 (1950), President Truman signed into law the Uniform Code of Military Justice ("UCMJ"), Pub. L. No. 81-506, 64 Stat. 107, 149 (1950). When it became effective on May 31, 1951, the UCMJ for the first time established a single statutory basis for the administration of justice in all of the United States armed forces. Congress provided that the UCMJ applies equally in peace and war, worldwide, UCMJ art. 5, 10 U.S.C. § 805, and to American service members and prisoners of war in custody of the armed forces, UCMJ art. 2(a)(1), (9), 10 U.S.C. § 802(a)(1), (9).

The UCMJ reflects a Legislative Branch determination that rules of law can and do apply to prisoners of war and other persons located at, among other places, Guantanamo Bay. Under Article 2, entitled "Persons subject to this chapter," the UCMJ is specifically made applicable to "persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States [with exceptions not applicable]." UCMJ art. 2(a)(12), 10 U.S.C. § 802 (a)(12). The United States base at Guantanamo Bay is one such area.

This congressionally-mandated system of military law is modern, comprehensive and of general application. Moreover, although the UCMJ delegates to the President the power to prescribe rules of procedure before courts-martial, military commissions, and other military tribunals, it circumscribes that power with the requirement that such procedures "not be contrary to or inconsistent with this chapter." UCMJ art. 36, 10 U.S.C. § 836. The Executive Branch, in prescribing rules for military commissions, may thus not impose procedural rules inconsistent with the UCMJ.

The UCMJ established not only a code of substantive and procedural law, but also a tiered system of judicial review, including intermediate appellate courts, UCMJ art. 66, 10 U.S.C. § 866, and extending up to the civilian United States Court of Appeals for the Armed Forces, formerly the United States Court of Military Appeals, UCMJ arts. 67, 141-45, 10 U.S.C. §§ 867, 941-45. The Military Justice Acts of 1968, Pub. L. No. 90-632, 82 Stat. 1335, and of 1983, Pub. L. No. 98-209, 310(a)(1), 97 Stat. 1405, further professionalized court-martial personnel, see UCMJ arts. 26, 66, 10 U.S.C. §§ 826, 866, and added certiorari jurisdiction in this Court, UCMJ art. 67a, 10 U.S.C. § 867a; 28 U.S.C. § 1259. Congress has forbidden military officers and other persons subject to the UCMJ to influence unlawfully the actions of courts-martial and other military tribunals, UCMJ art. 37, 10 U.S.C. § 837, and the military services have taken further steps to reduce command influence and insure the independence of the judiciary.

This Court, as well as courts throughout the military justice system, regularly re-affirm that military

personnel do not forfeit their rights to the protection of the law when they enter the military. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21-22 (1955); *United States v. Jacoby*, 11 C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960). Military personnel and prisoners of war in custody of the armed forces enjoy the following protections and guarantees, among others:

- Against self-incrimination, *compare* U.S. Const. amend. 5 *with* UCMJ art. 31, 10 U.S.C. § 831.

- Against double jeopardy, *compare* U.S. Const. amend. 5 *with* UCMJ art. 44, 10 U.S.C. § 844.

- Against cruel and unusual punishment, *compare* U.S. Const. amend. 8 *with* UCMJ art. 55, 10 U.S.C. § 855; see *United States v. Matthews,* 16 M.J. 354 (C.M.A. 1983).

- To a speedy trial, *compare* U.S. Const. amend. 6 *with* Rule for Courts-Martial 707.

- To a knowing, intelligent and voluntary waiver of trial rights before entering a guilty plea. *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1967).

Significantly, the rule of law in the military has also been enforced through the issuance of writs of habeas corpus by civilian courts. *E.g.*, *Reid v. Covert*, 354 U.S. 1 (1957); *Toth, supra*.

Over a half century of experience with the UCMJ has justified the Legislative determination that the rule of law can be applied in peace and war without modification and without concern that doing so will interfere with Executive Branch power.

B. International Law

The international law governing captured combatants has also developed since the tribunal that adjudicated the guilt and innocence of the various defendants in *Eisentrager* was held. In 1955, the United States ratified the Third and Fourth Geneva Conventions, relating to the treatment of prisoners of war, 6 U.S.T. 3316, T.I.A.S. 3364, and the protection of civilians in time of war, 6 U.S.T. 3516, T.I.A.S. 3365. These conventions have now been ratified by 191 nations, and form the cornerstone of international law regarding the treatment of belligerents. They provide as a bedrock principle that "every person in enemy hands must have some status under international law....There is no intermediate status; nobody in enemy hands can be outside the law." International Committee of the Red Cross, *Commentary on the Fourth Geneva Convention* 51 (Jean S. Pictet ed. 1952). Central to these conventions is the principle that, "having committed a belligerent act and having fallen into the hands of the enemy...such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 ("GPW"); see Evan J. Wallach, *Afghanistan,* Quirin *and* Uchiyama*: Does the Sauce Suit the Gander?* Army Law., Nov. 2003, at 18.

These developments in international law are designed to safeguard basic rights of captured personnel and avoid abuses that occurred in past conflicts. They are consistent with the increased emphasis on the rule of law as applied to this country's own military personnel. The United States has

committed itself to abide by these rules, prides itself on its compliance with them, insists on compliance by other countries, and condemns foreign governments that depart from their provisions.

II. The Treatment Of Individuals Seized During Hostilities Is Governed By Long-Standing Law And Practice In The United States Military

A. Applicable Law Provides For The Determination Of Status By Impartial Tribunals

The military forces of the United States have implemented the international law that was enacted in the GPW, and was ratified long ago by the United States, by adopting as their own rules and practice the Convention's requirement that individuals seized in combat be afforded the protection of competent tribunals to determine their status in doubtful cases. Army Regulation 190-8, entitled Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-6 (1997), provides:

> (a) In accordance with Article 5 [GPW], if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the U.S. Armed Forces, belongs to any of the categories enumerated under Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

> (b) A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

This identical regulation has been adopted in all branches of the United States armed forces. OPNAVINST 3461.6 (Navy), AF JI 31-304 (Air Force), MCO 3461.1 (Marine Corps). It reflects the consistent practice, at least since *Eisentrager*, of determining belligerent status through the use of impartial tribunals. See *Dep't of the Army, Field Manual on the Law of Land Warfare*, FM 27-10 § 71(a) (1956) (providing for a "competent tribunal" to determine the status of belligerents); MACV Directive No. 20-5 § 5(e) (Sept. 21, 1966, as amended Dec. 16, 1966) (stating that, in doubtful cases, "the necessity for a determination of status by a tribunal may arise"); Army Judge Advocate General's School, *Operational Law Handbook* 22 (O'Brien ed. 2003) (directing judge advocates to "advise commanders that, regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of the GPW Convention (GPW), at least until their status may be determined.")

In the United States military's Area of Operations ("AOR") that includes Afghanistan and Iraq, these provisions are further implemented by United States Central Command [CENTCOM] Regulation Number 27-13 (1995), which provides:

> All US military and civilian personnel of the Department of Defense (DOD) who take or have custody of a detainee will:....(2) Apply the protections of the GPW [Geneva Convention, Relative to the Treatment of Prisoners of War] to each EPW [Enemy Prisoner of War] and to each detainee whose status has not yet been determined by a Tribunal covered under this regulation.

This regulation applies to "all members of the United States Forces deployed to or operating in support of operations in the US CENTCOM AOR." Reg. 27-13 ¶ 2. Personnel who fail to treat any detainee in accordance with the GPW "may be subject to punishment under the UCMJ or as otherwise directed by competent authority." Reg. 27-13 ¶ 7(b).

There is simply no provision in any law, domestic or international, that permits a country's commander in chief, or its chief executive, to issue a blanket pronouncement that all personnel falling into the power of the United States in a particular theater of war are excluded from the protection of the GPW. The protections afforded by impartial tribunals are not voluntary or idiosyncratic efforts of field commanders, or applicable only to some detainees, but are the product of standing United States government regulations and orders that implement laws protecting all classes of detainees. These protections may not be circumvented by a claim that detained personnel are not entitled to status as enemy prisoners of war. By the explicit terms of the GPW, *every* detainee whose status has not been determined by an impartial tribunal is entitled to its protection.

Having undertaken to adhere to treaty obligations, our military services and Commander in Chief are not free to disregard them. *Service v. Dulles*, 354 U.S. 363 (1957). Petitioners here are asking for no more than the enforcement of protections provided by this Government's own procedures.

The Executive Branch has emphatically demanded – and rightly so, as required by international law – that these protections be accorded to Americans captured or detained in armed conflict, and has joined in condemnations of behavior that violates the Geneva Conventions. U.N.S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N.Doc. S/RES/674 (1990). The Defense Department recently "remind[ed] the Iraqis… [t]hat there are very clear obligations under the Geneva Convention to treat prisoners humanely." Statement of Deputy Secretary of Defense Wolfowitz, Mar. 23, 2003, Dep't of Defense News Transcript, <www.defenselink.mil/transcripts/2003/t03242003_t0323nec.html>. In objecting to the televised display of captured American soldiers, President Bush stated his insistence that prisoners be afforded the protections of international law. White House Press Release, March 23, 2003, <www.whitehouse.gov/news/releases/2003/03/20030323–1.html>.

In addition to these Executive Branch regulations and actions, Congress has specifically provided for court-martial jurisdiction over persons entitled to prisoner of war status at Guantanamo Bay. Such persons are explicitly within the jurisdiction of courts-martial pursuant to Article 2(a)(9) and (12) of the UCMJ, 10 U.S.C. § 802(a)(9), (12). Their presence in Guantanamo Bay is no obstacle to jurisdiction, because the UCMJ applies "in all places," UCMJ art. 5,

10 U.S.C. § 805. See Robinson O. Everett [Senior Judge, United States Court of Appeals for the Armed Forces], *The Law of War: Military Tribunals and the War on Terror*, Fed. Law. 20 (Nov./Dec. 2001).

Domestic law and practice thus make it clear that Guantanamo Bay has never been regarded by the United States as a "law-free" zone. United States courts exercise criminal jurisdiction over both citizens and aliens at Guantanamo Bay. 18 U.S.C. § 7(3); see *United States v. Lee*, 906 F.2d 117 (4th Cir. 1990); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975). In connection with the detainees currently interned at Guantanamo Bay, the United States has already asserted jurisdiction over an Army chaplain, two translators, and an intelligence officer. Judicial resolution of charges against those individuals has not troubled the Government, which is according rights to everyone except the detainees themselves.

While the Government devotes much attention to the supposed unavailability of habeas corpus in Guantanamo Bay, no such jurisdictional difficulty was found by the court with responsibility for the military justice system. In *Burtt v. Schick*, 23 M.J. 140 (1986), a Navy enlisted man confined at Guantanamo Bay sought a writ of habeas corpus after the prosecution had obtained a mistrial over his objection. Holding that the mistrial had been obtained without either "manifest necessity," *Arizona v. Washington*, 434 U.S. 497, 505 (1978), or the consent of the accused, the Court of Military Appeals unanimously granted the writ against the officer-in-charge of the Guantanamo Bay brig. In doing so, it found no obstacle to asserting habeas corpus jurisdiction over individuals at Guantanamo Bay.

B. Enforcement Of These Rules Does Not Interfere With Military Necessity

The experience of United States armed forces in combat belies the Government's expressed concern that judicial review of the claims of combatants "would interfere with the President's authority as Commander in Chief." (Opp. at 11) Courts-martial, prisoner status determinations, and other legal processes have been a regular adjunct of American wartime operations throughout the period since *Eisentrager*.

- During the Vietnam era, the United States Army held approximately 25,000 courts-martial in the war theater. In 1969 alone, 7691 of these were special and general courts-martial, which are trials presided over by a military judge in which the defendant is entitled to a panel equivalent to a jury as provided in the UCMJ. Frederic L. Borch, *Judge Advocates In Combat: Army Lawyers in Military Operations from Vietnam to Haiti* 29 (2001). Another 1146 special and general courts-martial were held in Vietnam by the Marine Corps in 1969. In addition, still only in 1969, the Army held 66,702 less formal disciplinary proceedings under Article 15 of the UCMJ, 10 U.S.C. § 815. *Id.*

- The United States Military Assistance Command in Vietnam enforced strict requirements for the classification of captured personnel, including providing impartial tribunals to determine eligibility for prisoner of war status. Military Assistance Command Vietnam, *Directive No. 381-46, Annex A* (Dec. 27, 1967) and *Directive No. 20-5* (Sept. 21, 1966 as amended Mar. 15, 1968.)

- During the 1991 Persian Gulf War, the status of approximately 1200 detainees was determined by "competent tribunals" established for that purpose. Dep't of Defense, *Final Report to Congress: Conduct of the Persian Gulf War* 578 (1992); Army Judge Advocate General's School, *Operational Law Handbook 22* (O'Brien ed. 2003).

- At this very time, United States forces in Iraq, a theater of actual combat, are providing impartial tribunals compliant with Article 5 of the GPW to adjudicate the status of captured belligerents. Although details are difficult to come by, American commanders of forces in Iraq acknowledge that as many as 100 prisoners there have had their status adjudicated by impartial tribunals under Article 5 of the GPW. Dep't of Defense, *Briefing on Enemy Prisoner of War Status Categories, Releases and Paroles* (May 9, 2003).

If the United States is, at this very moment, providing Article 5 tribunals in a war theater, it is difficult to credit the argument that such tribunals in Guantanamo Bay would interfere with field commanders. Unlike the tribunals that operated in Vietnam, Iraq and elsewhere, tribunals in Guantanamo Bay, or courts in the continental United States with jurisdiction over the custodians of Guantanamo Bay detainees, would not be operating in war zones. The Government offers no credible argument that tribunals contemplated by Army regulations and required by the 191 nations subscribing to the Geneva Conventions would, in its words, "interfere with core war powers." Opp. at 19. Even less credible is the claim that providing prisoners who have been detained virtually incommunicado for almost two years without any

adjudication of status would constitute "use of litigation [as a] weapon" in ongoing hostilities as described in *Eisentrager*, 339 U.S. at 777-79. The rules, policy and practice of United States military forces show that the involvement of competent tribunals in determining the status and rights of detained combatants is a regular and necessary adjunct of military operations.

III. The Executive Branch Is Not Complying With These Rules, And Is Failing To Provide The Benefit Of The Process That Is In Place For Individuals Seized During Hostilities

At its heart, the position of the Executive Branch is that, because it has unilaterally declared these individuals to be outside the law, none of the existing rules governing the treatment of individuals detained in combat apply. Nor, it says, may any court or tribunal exercise the traditional power of ensuring that the Executive Branch obey the law, because, as Commander in Chief, the President has the final say on his own powers.

The Government's position is inconsistent with its own law and regulations, and with its actions in this and past conflicts. On the one hand, it argues that the domestic law enacted by Congress to provide for court-martial jurisdiction over individuals at Guantanamo Bay, the international law it has ratified to provide for impartial tribunals, and the military regulations it has adopted to apply and enforce those rules, are all inapplicable to these detainees because the Executive Branch says they interfere with the President's authority to make war. On the other hand, the Executive Branch by its actions insists on compliance

with these standards by other nations, and even accords statutory protections to its own personnel at Guantanamo Bay, the very site where it argues that judicial involvement will "fetter field commanders." So long as the United States applies this double standard, it unavoidably increases the jeopardy of United States personnel captured abroad, in this and future conflicts. If this country is to have credibility in seeking to apply standards of humane conduct in international conflict; if it is to maintain a position of moral leadership; and, not least, if it is to protect its own fighting forces, it should abide by the standards it has enacted, ratified and adopted.

The Solicitor General's authorities in support of a claimed unlimited and unreviewable right to "capture and detain," Opp. at 3, are particularly ill-chosen. In *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946), this Court granted a writ of habeas corpus holding that a Navy employee tried by a military tribunal in 1944 was "entitled to be released" because he was protected by the Constitution as interpreted under the Hawaiian Organic Act. In *Ex parte Quirin*, 317 U.S. 1 (1942), this Court adjudicated whether the petitioners were held in lawful custody and whether the tribunal trying them was lawfully constituted, convening in special session in defiance of a presidential order declaring that the federal courts were closed to these defendants. *Proclamation 2561, Denying Certain Enemies Access to the Courts of the United States*, 7 Fed. Reg. 5101 (Jul. 3, 1942).

While the Executive Branch concedes the possibility that these detainees may have rights, it maintains that it alone has authority to determine what those rights are. It has already determined that the

detainees are not entitled to know the charges against them, are subject to indefinite confinement whether or not charged and even if acquitted, can have no access to counsel, and are entitled to no judicial review of their status or the conditions of their confinement. Those basic protections being denied, it is difficult to enumerate what rights known to an American system of law the Executive Branch proposes to implement.

* * *

Military legal process can and does function without impairing the Executive's war powers. The United States has fought enemies the world over while recognizing and respecting the rights that it seeks to deny here. America's integrity, and the protection of this country's own fighting forces, demand that it continue to recognize those rights today. To ask that the Executive Branch comply with its own regulations, which in turn apply consistent domestic and international law, is not to seek any restraint on the executive function. To ask that the Judicial Branch exercise its traditional responsibility of applying the law, is not to seek any extension of the judicial function.

In the absence of law; in the absence of checks and balances; and in the absence of "the alembic of public scrutiny," *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950) (L. Hand, J.), the Executive Branch claims the right to operate an unprecedented secret American prison system free of any restraint or review. Affirming the decision below will leave the Executive Branch with unlimited and unreviewable discretion that fifty years of domestic and international legal developments have tried to contain.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

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